No. 89-852

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

EMMA TAYLOR, *et al.*,

Petitioners,

v.

GENERAL MOTORS CORPORATION, *et al.*,

Respondents.

BRIEF OF AMERICAN HONDA MOTOR COMPANY, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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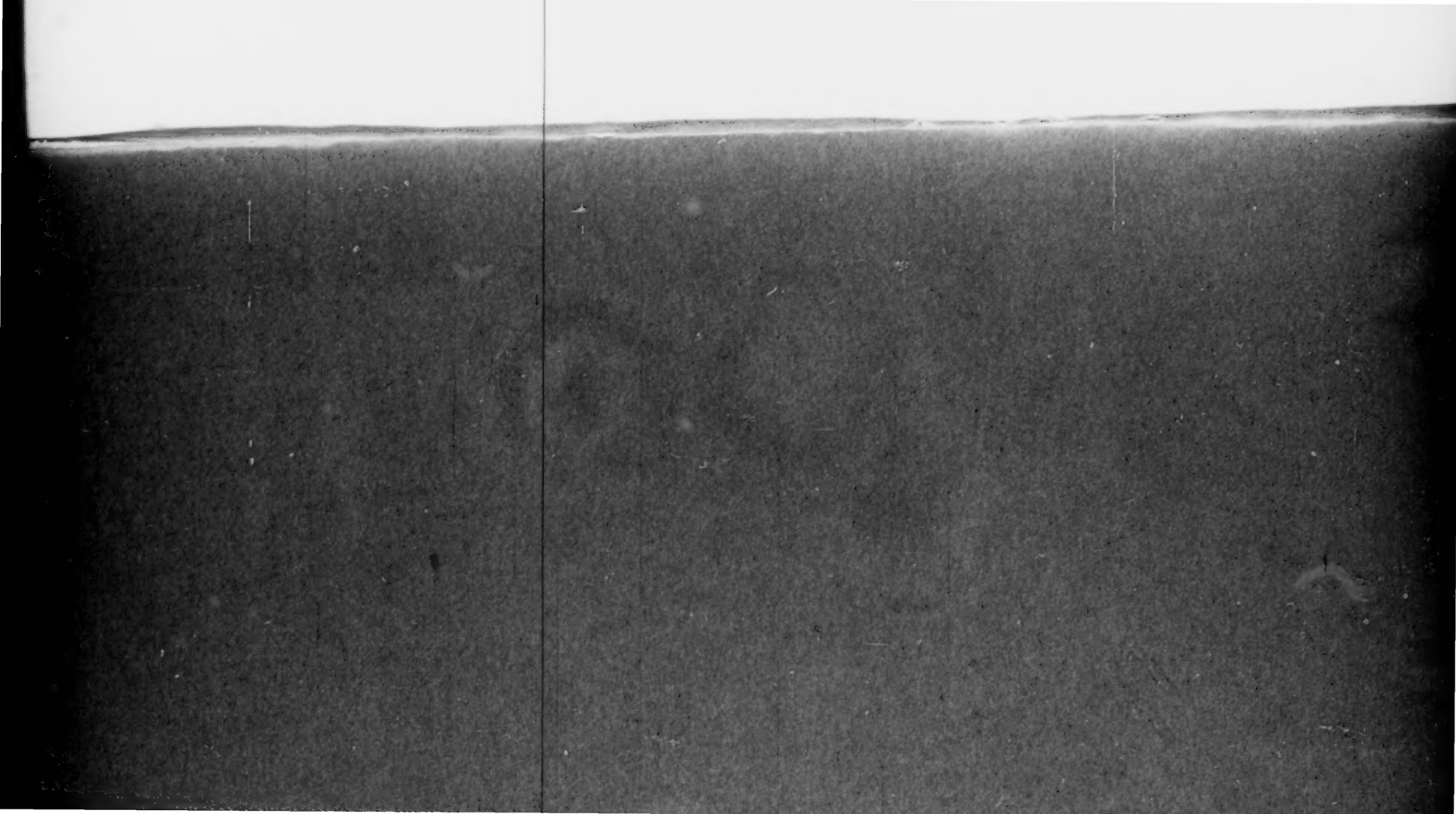

QUESTION PRESENTED

Whether this Court should review the Eleventh Circuit's decision that the National Traffic & Motor Vehicle Safety Act (15 U.S.C. §1381, *et seq.*) and Federal Motor Vehicle Safety Standard (FMVSS) 208 (49 C.F.R. §571.208) impliedly preempt common law damage claims that absent an air bag an automobile is defective because such claims frustrate the federal objectives of providing options and flexibility to the manufacturers in designing occupant restraint systems?

Rule 28.1 Statement

American Honda Motor Company, Inc., is a subsidiary of Honda Motor Company, Ltd. All subsidiaries and affiliates of American Honda Motor Company, Inc., are wholly owned, except for the following:

New Sabina Industries, Inc.;

F & P Manufacturing, Inc.;

Greenville Technology, Inc.;

Tomasco Mulciber Incorporated;

Sunbury Component Industries, Inc.;

T.S. Trim Industries;

Jefferson Industries Corporation;

Indiana Precision Technology, Inc.;

Blanchester FCM;

Yotec, Inc.; and

Musashi.

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CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The question presented in the Petition involves Article VI, clause 2, of the United States Constitution ("Supremacy Clause"):

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution

> or Laws of any State to the Contrary notwithstanding.

The Petition sets forth sections 1392(d) and 1397(c) of the National Traffic and Motor Vehicle Safety Act of 1966 ("Safety Act") and Federal Motor Vehicle Safety Standard 208, 49 C.F.R. §571.208 ("FMVSS 208"). Pet., pp. 2-3; App., pp. 36a-39a. The complete text of section 1391(2) of the Safety Act is:

> 1391(2) "Motor Vehicle Safety Standards" means a minimum standard for motor vehicle performance, or motor vehicle equipment performance, which is practicable, which meets the need for motor vehicle safety and which provides objective criteria.

Section 1392(a) provides:

> The secretary shall establish by order appropriate Federal Motor Vehicle Safety Standards. Each such Federal Motor Vehicle Safety Standard shall be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms.

The 1974 Amendment to the Safety Act, as codified in 15 U.S.C. §1410b, provides:

> §1410b. Occupant Restraint Systems
>
> (a) Amendment of Federal motor vehicle safety standard number 208; effective date. Not later than 60 days after the date of enactment of this section, the Secretary shall amend the Federal motor vehicle safety standard into conformity with the requirements of paragraphs (1), (2), and (3) of subsection (b) of this section. Such amendment

shall take effect no later than 120 days after the date of the enactment of this section.

(b) Federal motor vehicle safety standard requirements. After the effective date of the amendment prescribed under subsection (a):

(1) . . .

(2) Except as otherwise provided in paragraph (3), no Federal motor vehicle safety standard respecting occupant restraint systems may—

(A) have the effect of requiring, or

(B) provide that a manufacturer is permitted to comply with such standard by means of,

an occupant restraint system other than a belt system.

(3) . . .

(A) . . .

(B) Paragraph (2) shall not apply to any Federal motor vehicle safety standard which the Secretary elects to promulgate in accordance with the procedure specified in subsection (c), unless it is disapproved by both Houses of Congress by concurrent resolution in accordance with subsection (d). . . .

INTRODUCTION

The Eleventh Circuit, by joining the only two other circuit courts to decide the air bag preemption issue, recognized the unique regulatory impact of air bag claims and the weighty policy considerations underlying the Safety Act and FMVSS 208. *See Kitts v. General Motors Corp.*, 875 F. 2d 787 (10th Cir. 1989), *cert. pending*, No. 89-279; *Wood v. General Motors Corp.*, 865 F. 2d 395 (1st Cir. 1988), *cert. pending*, No. 89-46. The petitioners in this matter, and in the two other petitions before this Court, have failed to demonstrate that these decisions conflict with decisions in this Court, other federal courts of appeals, or with those of any state court of last resort. *See* Rule 17, Rules of the Supreme Court of the United States. Thus, there is no reason for this Court to grant the petitions involving the same issue which this Court declined to review last Term. *Wickstrom v. Maplewood Toyota, Inc.*, 416 N.W. 2d 838 (Minn. App. 1987), *cert. denied*, ___ U.S. ___ , 108 S. Ct. 2905 (1988).

Although no state court of last resort has resolved the air bag preemption issue, three out of four state intermediate appellate courts addressing the issue have also found these claims preempted. *See Nissan Motor Corp. in U.S.A. v. Superior Court*, 212 Cal. App. 3d 980, 261 Cal. Rptr. 80 (Cal. App. 1989); *Gardner v. Honda Motor Co.*, 145 A.D. 2d 41, 536 N.Y.S. 2d 303 (N.Y. App. 1988), *appeal dismissed*, 74 N.Y. 2d 715, 543 N.Y.S. 2d 401, 541 N. E. 2d 430 (1989); *Wickstrom v. Maplewood Toyota, Inc., supra. But see Gingold v. Audi-NSU-AutoUnion, A.G.*, 1989 WESTLAW 146372, ___ Pa. Super. ___ , ___ A. 2d ___ (Dec. 6, 1989) (application for rehearing *en banc*

pending).[1] Virtually all of the reported trial court decisions are in accord. *See Pokorny v. Ford Motor Co.*, 714 F. Supp. 739 (E.D. Pa. 1989), *appeal docketed*, No. 89-1527 (3d Cir. 1989); *Surles v. Ford Motor Co.*, 709 F. Supp. 732 (N.D. Tex. 1988); *Kelly v. General Motors Corp.*, 705 F. Supp. 303 (W.D. La. 1988); *Kolbeck v. General Motors Corp.*, 702 F. Supp. 532 (E.D. Pa. 1988); *Staggs v. Chrysler Corp.*, 678 F. Supp. 270 (N.D. Ga. 1987); *Hughes v. Ford Motor Co.*, 677 F. Supp. 76 (D. Conn. 1987); *Wattelet v. Toyota Motor Corp.*, 676 F. Supp. 1039 (D. Mont. 1987); *Schick v. Chrysler Corp.*, 675 F. Supp. 1183 (D.S.D. 1987); *Baird v. General Motors Corp.*, 654 F. Supp. 28 (N.D. Ohio 1986); *Cox v. Baltimore County*, 646 F. Supp. 761 (D. Md. 1986); *Vanover v. Ford Motor Co.*, 632 F. Supp. 1095 (E.D. Mo. 1986); *Dallas v. General Motors Corp.*, 1989 WESTLAW 141489 (W.D. Tex. Sept. 22, 1989); *Heftel v. General Motors Corp.*, 1988 WESTLAW 19615 (D.D.C. Feb. 23, 1988); *Hunter v. General Motors Corp.*, Prod. Liab. Rep. (CCH) para. 12,039 (D. Conn. Dec. 27, 1988); *Howard v. American Motors Corp.*, 1988 WESTLAW 156134, Prod. Liab. Rep. (CCH) para. 11,955 (S.D. Tex. July 6, 1988); *Bass v. General Motors Corp.*, 1987 WESTLAW 54449 (W.D. Tex. Sept. 14, 1987); *Vasquez v. General Motors Corp.*, 1986 WESTLAW 18671 (D.

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[1] At this time, the *Gingold* decision is not final in the Commonwealth of Pennsylvania because it is subject to (a) potential vacatur upon *en banc* consideration by the Superior Court of Pennsylvania, or (b) reversal upon discretionary review by the Supreme Court of Pennsylvania. In addition, *Gingold* is an aberration especially because of its unsupported views that common law tort claims do not have regulatory impact and that implied preemption analysis may never be undertaken in the presence of a general savings clause.

Ariz. 1986). *But see Murphy v. Nissan Motor Corp.*, 650 F. Supp. 922 (E.D.N.Y. 1987).[2]

The petition should be denied.

STATEMENT OF THE CASE

Petitioner Emma Taylor's husband, Charles E. Taylor, was killed in a car accident on February 3, 1983 while driving a 1980 Chevrolet automobile manufactured by General Motors Corporation. Petitioner Charles Evans' wife, Paula Evans, was killed in an unrelated car accident on November 23, 1983 while driving a 1977 Honda Accord distributed by American Honda Motor Company, Inc. The decedents were not wearing their seat belts at the time of their respective accidents. Each vehicle was equipped with three-point seat belts authorized by federal regulation in effect at the time of manufacture of these vehicles and at the time of these accidents. *See* 49 C.F.R. §571.208.[3] Petitioners Taylor and Evans sought recovery against General Motors and American Honda Motor Company, respectively, under causes of action

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[2] Forty unpublished decisions also have held air bag claims preempted. (See list cited in General Motors Corporation's Brief in Opposition to Petition for Writ of Certiorari in *Kitts*, No. 89-279, pp. 3-5; and see *Sturges v. Sokorai*, No. L-072741-86 (N.J. Super. Ct. Oct. 27, 1989); *Taylor v. Nissan Motor Co.*, No. EAC-54484 (Cal. Super. Ct. Aug. 31, 1989); *Gorley v. Ford Motor Co.*, No. 87-L-17034 (Ill. Cir. Ct. Aug. 1, 1989); *Mudrick v. Nissan Motor Co.*, No. C539035 (Cal. Super. Ct. July 31, 1989); *Olson v. Toyota Motor Corp.*, No. C593215 (Cal. Super. Ct. July 26, 1989)).

[3] Honda adopts the legislative and regulatory history of the Safety Act and FMVSS 208 contained in the General Motors Corporation Brief in Opposition to the Petition for Writ of Certiorari in *Wood*, No. 89-46, at pp. 3-11.

in strict liability and negligence. These claims are premised entirely on the theory that the automobiles were defective because they were not equipped with air bags.

The manufacturers moved to dismiss the Fifth Amended Complaint on the grounds that the air bag claims did not state a cause of action under Florida law and that the claims were preempted by federal law.

On August 25, 1987, the United States District Court for the Southern District of Florida dismissed the Fifth Amended Complaint primarily on the ground that the "airbag claims" did not state a cause of action under Florida law. App., p. 33a. That court did not reach the preemption issue.

On June 14, 1989, the United States Court of Appeals for the Eleventh Circuit held that, while Florida law recognized such a cause of action, the claims were impliedly preempted by federal law. App., pp. 23a-24a. The Eleventh Circuit denied the petition for rehearing on August 28, 1989. App., pp. 34a-35a.

REASONS FOR DENYING THE WRIT

I. THE ELEVENTH CIRCUIT CORRECTLY APPLIED CONTROLLING PRECEDENTS.

A. Traditional Implied Preemption Analysis.

Traditional preemption analysis is familiar to this Court. The Supremacy Clause permits Congress to preempt state law in a number of ways. First, Congress may expressly displace state law. The question in express preemption analysis is whether Congress provided for preemption "by so stating in express

terms." *California Federal Savings & Loan Association v. Guerra*, 479 U.S. 272, 280-81 (1987).

The second type of preemption is implied preemption. One species of implied preemption asks whether "Congressional intent to preempt state law may be inferred where the scheme of federal regulation is sufficiently comprehensive." *California Federal Savings & Loan Association v. Guerra*, 479 U.S. 272, 280-81 (1987); *see Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988). Federal law impliedly preempts state law "to the extent it actually conflicts with federal law," *California Federal*, 479 U.S. at 281; *see International Paper Co. v. Ouellette*, 479 U.S. 481, 491 (1987), and such conflict occurs either because "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), or because the state law stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *see Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981). The Petition involves the latter type, state common law claims which stand as an obstacle to the purposes of Congress.

Because "the purpose of Congress is the ultimate touchstone of the pre-emption inquiry," it is necessary in this context to first examine the purposes underlying the Safety Act, and, second, to examine the effect of state law on these purposes. *California Federal Savings & Loan Ass'n v. Guerra*, 479 U.S. 272, 284 (1987); *Perez v. Campbell*, 402 U.S. 637 (1971). There is an actual conflict if there is a "prospect of interference with the federal regulatory power,"

Schneidewind v. ANR Pipeline Co., 485 U.S. 293, ___, 108 S. Ct. 1145, 1156 (1988); *see McCarty v. McCarty*, 453 U.S. 210, 234 (1984) ("the potential for disruption"), or if the state law "interferes with the methods by which the federal statute was designed to reach [its] goal[s]." *International Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987); *Michigan Canners & Freezers Ass'n v. Agricultural Marketing & Bargaining Bd.*, 467 U.S. 461, 477 (1984).

In addition, FMVSS 208 has a most thorough and complex regulatory history over the last twenty years. *See Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29 (1983); *State Farm Mutual Automobile Ins. Co. v. Dole*, 802 F. 2d 474 (D.C. Cir. 1986), *cert. denied sub nom. New York v. Dole*, 480 U.S. 951 (1987); *Public Citizen v. Steed*, 851 F. 2d 444 (D.C. Cir. 1988); Wilton, *Federal Issues in "No Airbag" Tort Claims: Preemption and Reciprocal Comity*, 61 Notre Dame L. Rev. 1 (1986). Authorized regulations of an agency will preempt any state law that conflicts with such regulations or frustrates regulatory purposes. *See City of New York v. F.C.C.*, 486 U.S. 57 (1988); *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982) ("federal regulations have no less preemptive effect than federal statutes"). A state law that actually conflicts with a federal statute or authorized regulation is "preempted by direct operation of the Supremacy Clause," and without any specific Congressional intent to preempt state law. *See Brown v. Hotel & Restaurant Employees and Bartenders Int'l Union*, 468 U.S. 491, 501 (1984); *Free v. Bland*, 369 U.S. 663 (1962). Furthermore, "the relative importance to the State of its own law is not material when there

is a conflict with a valid federal law, for any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield." *Felder v. Casey*, 487 U.S. 131, ___ , 108 S. Ct. 2302, 2306 (1988).

The Eleventh Circuit correctly followed and applied these controlling precedents. That court noted: "[e]ven where the preemptive intent is unclear from its statutory language or legislative history, the federal law nevertheless preempts the state law to the extent that the ordinary application of the two laws creates a conflict." App., p. 20a.

B. Legislative and Regulatory Purposes.

The Eleventh Circuit also correctly discerned the Congressional and regulatory purposes underlying the Safety Act and FMVSS 208. The legislative history of the Safety Act indicates that "this legislation can further industry efforts to provide motor vehicles which are . . . crash-worthy," S. Rep. No. 1301, *reprinted in* 1966 U.S. Code Cong. & Admin. News 2709, 2712, and that such standards are "not intended or likely to stifle innovation in automotive design." *Id.* at 2714.

Flexibility was strongly emphasized by the National Highway Traffic Safety Administration (NHTSA) in its promulgation of FMVSS 208. By allowing manufacturers to choose one of three occupant restraint options, the agency believed that FMVSS 208 would "provide sufficient latitude for industry to develop the most effective systems [and] should enable the manufacturers to overcome any concerns about public acceptability by permitting such public choice." 49 Fed. Reg. 28997 (1984); *see Baird v. General Motors Corp.*,

654 F. Supp. 28, 32 (N.D. Ohio 1986). The agency further determined that restricting manufacturers to a single choice, like "airbags," risked "killing or seriously retarding development of more effective, efficient occupant protection systems," 49 Fed. Reg. at 29001, and that a mandatory airbag rule would reduce the manufacturers' incentive to refine existing technologies or develop new ones. 49 Fed. Reg. at 29001 (1984). Indeed, the Department of Transportation feared that a mandatory air bag rule might cause "disastrous economic consequences for the entire nation." "The Secretary's Decision Concerning Motor Vehicle Occupant Crash Protection," D.O.T., pp. 11-12 (December 6, 1976).

These options were sanctioned by Congress in its 1974 amendment to the Safety Act, codified at 15 U.S.C. §1410b, which "expressly approved the right of an automobile manufacturer to comply with the Safety Act by installing manual seat belts or passive restraints." App., p. 20a. Congress further sanctioned these options by providing in 1978 and 1979 that "none of the funds appropriated [for the Department of Transportation] shall be used to implement or enforce any standard or regulation which requires any motor vehicle to be equipped with an occupant restraint system (other than a belt system)." Pub. L. No. 95-335, §317, 92 Stat. 435, 480 (1978); Pub. L. No. 96-131, 3317, 93 Stat. 1023, 1039 (1979); *see* App., p. 21a. The Eleventh Circuit held that the petitioners' state common law claims would "take away the flexibility provided by a federal regulation," "remove the element of choice authorized in Safety Standard 208" and "frustrate the federal regulatory scheme." App., p. 23a.

The Eleventh Circuit correctly recognized that the impairment of federally mandated flexibility is a well-recognized basis for preemption. *See Lawrence County v. Lead-Deadwood School District*, 469 U.S. 256, 263 (1985); *Capital Cities Cable Co. v. Crisp*, 467 U.S. 691, 708 (1984); *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982); *see also Pokorny v. Ford Motors Co.*, 714 F. Supp. 739, 742 (E.D. Pa. 1989), *appeal docketed*, No. 89-1527 (3d Cir. 1989); *Kolbeck v. General Motors Corp.*, 702 F. Supp. 532, 541 (E.D. Pa. 1989); *Staggs v. Chrysler Corp.*, 678 F. Supp. 270, 274 (N.D. Ga. 1987); *Schick v. Chrysler Corp.*, 675 F. Supp. 1183 (D.S.D. 1987).

Although not addressed by the Eleventh Circuit, the state common law claims, if successful, would also "frustrate" or "stand as an obstacle" to another important, although subsidiary, purpose of the Safety Act to have national uniform standards. *See Wood v. General Motors Corp.*, 865 F. 2d 395, 410 (1st Cir. 1988); *Kitts v. General Motors Corp.*, 875 F. 2d 787, 789 (10th Cir. 1989); *Wattelet v. Toyota Motor Corp.*, 676 F. Supp. 1039, 1040 (D. Mont. 1987); *Heftel v. General Motors Corp.*, 1988 WESTLAW 19615 (D.D.C. 1988); *Wickstrom v. Maplewood Toyota, Inc.*, 416 N.W. 2d 838 (Minn. App. 1987). The legislative history clearly reflects that Congress intended uniform national standards. The House Report provides:

> Basically, this preemption subsection is intended to result in uniformity of standards so that the public as well as industry will be guided by one set of criteria rather than by a multiplicity of diverse standards.

H.R. Rep. No. 1776, 89th Cong. 2d Sess. 17 (1966). Similarly, the Senate Report provides:

> The centralized, mass production, high volume character of the motor vehicle manufacturing industry in the United States requires that motor vehicle safety standards be not only strong and adequately enforced, but that they be uniform throughout the country.

S. Rep. No. 1301, 89th Cong. 2d Sess. (1966), *reprinted in* 1966 U.S. Code Cong. & Admin. News 2709.

Furthermore, as Senator Ribicoff recognized:

> It becomes very obvious that this problem is so vast that the Federal Government must have a role. It is obvious that the 50 states cannot individually set standards for the automobiles that came into those 50 states from a mass production industry. 112 Cong. Rec. at 14232 (1966).

President Johnson also recognized the need for "strict national standards," emphasizing that "the only alternative is unthinkable—50 state standards for 50 different states. . . this would be chaotic." 112 Cong. Rec. at 14253 (1966).

It is obvious that this goal of national uniformity would be entirely frustrated by permitting individual states to impose liability because of the absence of air bags. *See Cox v. Baltimore County*, 646 F. Supp. 761, 764 (D. Md. 1986). Since Congress felt that the best way to achieve improved automotive safety would be to maintain the uniformity of federal standards, then tort liability, under traditional implied preemption analysis, interferes with the accomplishment of

that goal and the methods by which Congress intended to achieve the primary goal of safety. *See Wood v. General Motors Corp.*, 865 F. 2d at 412; *see also Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978) (national uniform standards for oil tankers).

C. FMVSS 208 Is Unique.

The suggestion by the petitioners that the holdings of the First, Tenth and Eleventh Circuits would create an across-the-board exception to crashworthiness law, or even tort law in general, is unfounded. *See* Pet., p. 5. Rather, the actual scope of preemption is narrow and limited. FMVSS 208 is unique among the federal standards, not only for its lengthy regulatory history and substantial policy objectives, but also because FMVSS 208 has elements of both a design and performance standard since it "mandates how a vehicle or item of vehicle equipment should be designed." *Wood v. General Motors Corp.*, 865 F. 2d at 416. Typical federal safety standards, on the other hand, are performance standards, *see* 15 U.S.C. §1391(2), which establish "a test for a certain aspect of a vehicle's performance without mandating how the vehicle should be designed to comply with the test." *Wood*, 865 F. 2d at 416. The usual common law action for *design* defects would rarely, if ever, conflict with a pure performance standard, but would conflict with the unusual performance/design characteristics of FMVSS 208.

In addition, air bag claims are unique in that they may be asserted against automobile manufacturers in virtually every automobile accident. Indeed, "airbag suits are of the broadest general applicability . . . potentially affecting every vehicle on the road . . . and thus are most similar to a state regulation." *Wood*

v. General Motors Corp., 865 F. 2d at 418. Petitioners have not cited, and cannot cite, any other federal safety standard which would present the same potential for conflict with state design defect common law actions. Nor have the petitioners referred to any other common law crashworthiness claim which would have a regulatory impact similar to air bag claims.

D. The Act's General Savings Clause Does Not Preserve the Air Bag Claims Which Actually Conflict with the Federal Goals and Purposes.

Petitioners complain, without citation of authority, that the decision of the Eleventh Circuit "ignores the clear and explicit language of §1397(c)." Pet., p. 24. The Eleventh Circuit, however, did not ignore the general savings clause but merely put the clause into its proper perspective.

That court stated:

> We reject the appellants' argument that the Safety Act's savings clause forecloses a finding of implied preemption. See *Wood v. General Motors Corp.*, 865 F. 2d 395, 415-16 (1st Cir. 1988) (citing *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), and *Texas & Pacific Railway Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), for the proposition that a "general" savings clause, such as that contained in the Safety Act, does not preclude a finding of implied preemption. (App., p. 23a n. 20).

The First Circuit in *Wood v. General Motors Corp.*, 865 F. 2d 395, 415 (1st Cir. 1988), recognized that "general savings clauses may not be read literally to permit common law actions that contradict and sub-

vert a statutory scheme." While the savings clause, §1397(c), provides that "compliance" with federal standards does not exempt one from liability, it does not address the rare circumstance of conflicts between state and federal law, and "does not express an unambiguous intent to preserve a state suit that conflicts with a federal standard." *Id.* at 414; *see Schick v. Chrysler Corp.*, 675 F. Supp. 1183, 1185 (D.S.D. 1987); *Wickstrom v. Maplewood Toyota, Inc.*, 416 N.W. 2d 838 (1987).

Petitioners' attempt to extend the reach of the general savings clause should be rejected. Section 1397(c) cannot, by itself, negate the application of implied preemption analysis, and cannot revive preempted state law which stands as an obstacle to the accomplishment of federal goals and objectives. *See International Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987) (Congress certainly would not have "intended to undermine this carefully drawn statute through a savings clause"); *Chicago & Northwestern Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 328 (1981).

This court has frequently found savings clauses inapplicable when the state remedy at issue would "be absolutely inconsistent with the provisions of the act." *Texas & Pacific Railway Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907); *see Arrow Transp. Co. v. Southern Ry.*, 372 U.S. 658, 671 (1963); *T.I.M.E., Inc. v. United States*, 359 U.S. 464, 473 (1959); *United States v. Public Utilities Comm'n*, 345 U.S. 295, 315 (1953). In other words, "the act cannot be held to destroy itself." *Abilene*, 204 U.S. at 446. The purpose of a savings clause is "not to nullify other parts of the act, or to defeat rights or remedies given by

preceding sections, but to preserve all existing rights which were not inconsistent with those created by the statute." *Pennsylvania Railroad Co. v. Puritan Coal Mining Co.*, 237 U.S. 121, 129 (1915).

The Eleventh Circuit properly followed these controlling precedents. As a practical matter, the savings clause would preserve a wide range of common law design claims which do not and cannot conflict with purely performance-oriented federal standards. It is only in the rare and unique case, as here, that the savings clause has no effect, where the significant policy objectives of a design based federal safety standard actually conflict with a state common law tort action.

II. THERE IS NO CONFLICT WITH DECISIONS IN OTHER CIRCUITS.

The argument in the *Wood* petition (pp. 9-13) that several federal circuit courts of appeals have found that the Safety Act was not intended to preclude common law claims is simply wrong. The decision of the Eleventh Circuit is in precise accord with the decision of the First Circuit in *Wood* and with the Tenth Circuit in *Kitts*.[4] The cases cited in the *Wood* petition, *see, e.g., Dawson v. Chrysler Corp.*, 630 F. 2d 950, 957-58 (3rd Cir. 1980), merely hold that compliance with federal safety standards is relevant but not conclusive on the merits of a design defect claim.

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[4] In light of the fact that only three federal appellate courts have addressed the precise question presented, review by this Court may be premature. Undoubtedly, further appellate decisions will be rendered on this issue. *E.g., Pokorny, appeal docketed*, No. 89-1527 (3d Cir. 1989). More appellate decisions on this issue would be of unquestionable benefit to this Court.

In contrast, preemption analysis involves a finding not of compliance but of a conflict between state and federal law. *See Wood v. General Motors Corp.*, 865 F. 2d at 417-18; *Staggs v. Chrysler Corp.*, 678 F. Supp. 270, 272 (N.D. Ga. 1987). None of the cited cases involved a federal design standard similar to FMVSS 208, and none involved a direct conflict between a federal standard and a state common law design defect claim. *See* General Motors Corporation Brief in Opposition to the Petition for Writ of Certiorari in *Wood*, No. 89-46, at pp. 20-23.

III. THERE IS NO CONFLICT WITH OTHER DECISIONS OF THIS COURT.

A. "Presumption" Against Preemption.

Petitioners contend that the Eleventh Circuit violated this Court's statement in *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947), when it held that "no such presumption [against preemption] is applicable in deciding whether state law conflicts with federal law, even where the subject of the state law is a matter traditionally regarded as properly within the scope of the states' rights." App., p. 20a.

Petitioners single out from *Rice* an isolated statement wherein this Court resolved to assume that state law was not to be displaced by a federal act unless Congressional intent to do so was clear. *Rice*, 331 U.S. at 230. Without belaboring the obvious, it is plain that the "clear and manifest purpose of Congress" referred to in *Rice* is equivalent to an explicit definition by Congress. *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, ___, 108 S.Ct. 1145, 1150 (1988) (citing *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95-96 (1983)). That, of course, is the very nature of *express* preemption.

When implied preemption analysis is involved, however, it is the purposes of the Act and its regulations that are in issue. Any state law that stands as an obstacle to the accomplishment of such federal purposes is preempted without the need for "a clear and manifest" statement from Congress. *See California Federal Savings & Loan Ass'n v. Guerra*, 479 U.S. 272, 281, 284 (1987); *Michigan Canners & Freezers Ass'n v. Agricultural Marketing and Bargaining Board*, 467 U.S. 461, 469 (1984). A state law that actually conflicts with federal law is "pre-empted by direct operation of the Supremacy Clause." *Brown v. Hotel & Restaurant Employees and Bartenders Int'l Union*, 468 U.S. 491, 501 (1984).

The Eleventh Circuit properly followed this Court's lesson when it recognized that "the relative importance to the state of its own law is not material when there is a conflict with a valid federal law." App., p. 20a (quoting *Felder v. Casey*, 487 U.S. 131, ___, 108 S. Ct. 2302, 2306 (1988)).

The decision below does not conflict with *Rice*.

B. *Silkwood v. Kerr-McGee* Corporation.

Petitioners contend that *Silkwood v. Kerr-McGee Corporation*, 464 U.S. 238 (1984), counsels against a finding of preemption "if Congress intends to allow tension between federal regulations and states awarding damages based on state liability law." Pet., p.9. *Silkwood* not only is inapplicable to the issue presented here, but its holding has been sorely miscast. *See Wood v. General Motors Corp.*, 865 F. 2d at 411-12.

The issue in *Silkwood* was whether *punitive* damages were recoverable under the Price-Anderson Act;

the plaintiff's entitlement to compensatory damages was undisputed. The "tension" this Court spoke of was that created by the meeting of two very different concepts: 1) the fact that this Court had recently established that federal regulations occupied the field of nuclear safety, *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190, 212 (1983), and 2) the fact that Congress had enacted the Price-Anderson Act, 42 U.S.C. §2011, 2210 (1982), limiting the aggregate liability for accidents of nuclear facilities. *Silkwood*, 464 U.S. at 256. The very existence of a scheme where the government would indemnify operators of nuclear facilities strongly evidenced a Congressional intent to allow common law damages actions. *See Wood*, 865 F. 2d at 411. This Court ruled that the recovery of punitive damages was not preempted by the Price-Anderson Act. The *Silkwood* Court recognized that state common law actions would be preempted if the actions "would frustrate the objectives of the federal law." 464 U.S. at 256. Yet, the Court perceived no conflict under the circumstances in that case.

There is no evidence that Congress, by enacting the Safety Act, intended to preserve *conflicting* state tort claims or that there is a "tension" similar to that involved in *Silkwood* that Congress intended to accept. *See Wood*, 865 F. 2d at 412. Petitioners suggest absolutely no reason why Congress would encourage regulation by jury verdict in a manner totally inconsistent with the federal regulatory scheme. The fact that FMVSS 208 is a precisely drawn, carefully considered "design" standard sanctioned by a statute, 15 U.S.C. §1410b(a)-(b), belies any notion that Congress

would find conflicting state-created design standards an acceptable form of "tension."

The decision below does not conflict with *Silkwood*.

C. Following *de la Cuesta*.

Petitioners advise that the Eleventh Circuit incorrectly applied *Fidelity Federal Savings Loan Association v. de la Cuesta*, 458 U.S. 141 (1982). Significantly, Petitioners do not allege that the decision below is in conflict with *de la Cuesta*. Nevertheless, the propriety of the Eleventh Circuit's ruling following *de la Cuesta* merits brief attention.

This case involves implied preemption grounded on the premise that the "state law [would stand] as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Schneidewind*, 108 S.Ct. at 1151; *Silkwood*, 464 U.S. at 248. Among the "full purposes and objectives of Congress" in enacting the Safety Act in general, and in authorizing the passage of FMVSS 208 in particular, was the grant to automobile manufacturers of flexibility in the design of passenger restraint systems. *See* 15 U.S.C. §1410b (even if the legislative veto provision is invalid under *I.N.S. v. Chadha*, 462 U.S. 919 (1983)). As stated by the Eleventh Circuit, "the effect of the regulatory scheme. . . is unmistakable: it grants automobile manufacturers the option of complying with federal standards for occupant crash protection by installing manual seatbelts instead of airbags." App., pp. 21a-22a.

As this Court held in *de la Cuesta*, where state courts rob entities of federally granted flexibility in the manner in which those entities conduct business, Congressional objectives are not fulfilled; in that cir-

cumstance, state law must yield. 458 U.S. at 155. That the Homeowners' Loan Act of 1933 ("HOLA"), 12 U.S.C. §1461 *et seq.*, does "not contain a savings clause similar to §1397(c) of the Safety Act," or that HOLA does not "expressly preserve common law remedies,"[5] Pet., p.8, is inconsequential.

CONCLUSION

The writ of certiorari should not issue.

Respectfully submitted,

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December 29, 1989.

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[5] Respondent strenuously disputes the implication that the Safety Act expressly preserves common law remedies. To the contrary, nothing in the Act so provides. Section 1397(c) speaks in terms of defenses on the merits, and is further limited in application in the air bag context. *Wood* 865 F.2d at 418; *see supra*, pp. 15-18.